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IN THE

Supreme Court of the United States

OCTOBER TERM, 1970

NO. .....

A. M. FRANCO,

Petitioner,

VERSUS

STEIN STEEL & SUPPLY COMPANY,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF GEORGIA

OPINION BELOW

The opinion and judgment of the Georgia Supreme Court is appended hereto (App. A) is officially reported in 227 Ga. 92 (..... S.E. 2nd. .....). The Motion for rehearing and decision is appended hereto (App. B). The judgments of the Fulton Superior Court are appended hereto (App. C, D). The stay of the remittitur is appended hereto (App. E).

JURISDICTION

The judgment of the Supreme Court of Georgia was dated and entered on November 12, 1970. A rehearing in said judgment was denied by the Supreme Court of Georgia on December 17, 1970. The jurisdiction of this Court is invoked under 28 USC 1257(3) since a right,

privilege, or immunity is specially claimed under the Constitution of the United States.

QUESTIONS PRESENTED FOR REVIEW

The question presented is whether when a party may bring a Petition before a Judge, without notice, and without adversary proceeding, and have the Judge issue an Exparte Order requiring the Defendant to turn over to a special receiver and auditor his work products and most of the items of his business whether his or not, and order the Defendant or others under his direction or in his employ to turn over documents at a place to be designated by the said Auditor and ordering the said Auditor within seven days after taking possession of the documents and property to hear evidence to determine ownership of such records and to make a decision and report back to the Court, it deprives the Defendant of due process of law as guaranteed by the Fourteenth Amendment of the Constitution.

CONSTITUTIONAL PROVISIONS INVOLVED

Amendment Fourteen of the Constitution for the United States provides:

> "Nor shall any State deprive any person of life, liberty, or property, without due process of law."

STATEMENT OF CASE

The respondent (Plaintiff in the lower Court) brought a Petition against the Petitioner, A. M. Franco alleging that Petitioner was a registered professional Engineer and was an officer of the Corporation (Plaintiff) whose business it was to design structural steel items. The Petitioner's duties were alleged to be that he consulted with

customers and used his engineering skills in connection with problems that might arise in the fabrication, delivery and erection of steel supplies by the corporation. It alleges that the Petitioner had been billing and personally receiving retainers from the Corporations, customers and potential customers for services for which the Petitioner was employed. It is alleged that the Petitioner had not included a share of the salary and expenses in connection with his duties for the Corporation in the prices of the contracts he entered into where the Plaintiff furnished the steel items and that the Plaintiff had been unable to recover the value of the services performed by the Petitioner from the customers with whom the Petitioner had been dealing. It is further alleged that Defendant had possession of plans, drawings, compilations, negotiated proposals, rough sheets, lists of Plaintiff's customers, correspondence and other business records and documents which the Plaintiff asked the Court to restrain the Petitioner from disposing or secreting and to turn these records as well as any other records not belonging to the Corporative Plaintiff which reflected Engineering services performed by the Petitioner or others under his direction during the time that he had been employed by the Plaintiff, and which the Defendant claims to be unconnected with his employment by the Plaintiff.

With the Petition was filed an affidavit by Milton O. Stein, the President of the Corporation who stated that the Petitioner had prepared or supervised the preparations of a design of structural steel for a certain project, known as the New Britain Job to be built for Litton Industries, Inc., which design effort was worked on by the Defendant, and which the corporation subsequently

learned had been paid for by Litton Industries to the Defendant under the name of A. M. Franco Engineers and A. M. Franco Consultant Engineers, the relationship was terminated. The Petition was brought setting up the above facts and presented to the Honorable Charles Wofford, Judge, Atlanta Judicial Circuit, Georgia, on July 2, 1970, before filing or serving said Petition and the affidavit. The Petitioner was not notified that the Petition was being brought and had no previous knowledge that an Order was about to be issued relieving him of his property. The petitioner lived within the jurisdiction and his home address was well known to the Plaintiff, and no reason is shown why he was not notified of the proceedings that were about to be initiated. The matter of being presented exparte to the said Judge, he issued an Order restraining the Petitioner from destroying, disposing of in any manner, copying, diverting for his own use or divulging to any other than the Plaintiff all of the above enumerated material and at the same time issuing an order also Exparte requiring the Defendant to turn over to William H. Cates as special auditor all of the enumerated documents or any documents which were related to any engineering services that the Petitioner or others on his direction or in his employ may have performed for anyone during the period of time that the Petitioner was in the employ of the Plaintiff and further ordered that said Auditor was to take possession of such property within seven days and determine the ownership of such property. After the passing of the above exparte two orders but before the interlocutory hearing, on July 13, 1970, the Auditor had a hearing at which the Defendant was requested to produce all of the property described in the Petition. On

July 21, 1970, an interlocutory hearing was held before the Honorable Jack Etheridge, Judge of the Superior Court, Atlanta Judicial Circuit, who after hearing evidence, which evidence showed that the Petitioner was a free agent, and an independent Contractor as an Engineer in all phases of Engineering and that the only duties and the only work that he had done while paid by Stein Steel & Supply Company was the supervision of work in connection with structural steel, and that he had not competed with the Plaintiff in this field and that he had done work for some people as a General Engineer, working with cement, wood, and soil analysis. Said Judge Etheridge in effect continued the formal order issued Exparte and in disposing of the appointment of an Auditor stated that it being contended that the order would put the Petitioner out of business, that the Exparte Order was modified so that the records of the Petitioner which were not current and were not needed in the usual or ordinary course of his business shall be subject to the provisions of the Order as written and those records which the Petitioner needed in the usual ordinary course of his business should be inventoried and listed, such listing to be furnished immediately to the Auditor. The Auditor was to be furnished with copies of records in dispute.

An appeal was taken to the Georgia Supreme Court setting out four enumerations of errors. Ground Three of the Enumeration of Errors stated that the Orders of the Court Exparte set out above were unconstitutional and contrary to the Fourteenth Amendment to the Constitution, same depriving the Defendant of his liberty and property without an opportunity for a hearing. The Supreme Court overruled all the Enumerations of Errors

and affirmed the judgment of the Lower Court. A motion for a rehearing was made by the Petitioner which cited the case of *Murphy v. Murphy,* 214 Ga. 602, 605(2) 106 S.E. 2nd. 280 which stated as follows:

> "The record in this case shows that the Exparte orders or judgments excepted to are void. Being directly interested in the proceeds from the Insurance Policies and partnership realty which the Defendant was authorized to sell at a private sale, the Plaintiffs were entitled to notice of any application affecting the change in the status of either and an opportunity to be heard in opposition to an order or judgment prayed for. Where, as here, a party is being divested of property rights by proceedings instituted by an opposite party to the cause, nothing short of a notice of the proceedings and an opportunity to be heard in opposition thereto will satisfy the due process causes of the Constitution of this State and the United States. This ought to be and is elementary."

SUMMARY OF REASONS FOR ALLOWANCE OF WRIT

1. The Georgia Supreme Court is contrary to the following decisions of this Court: *Carroll v. President & Commissioners of Princess Anne,* 393, U.S. 175 (21 L.Ed. 2d. 325) 89 S.Ct. 347; *Broussard v. Cormier,* 154 La. 877, 98 So. 403; *Eighth Regional War Labor Board v. Humble Oil & Ref. Co.,* 145 F.2d. 462, cert. den. 325; *LaCassagne v. Chapius,* 144 U.S. 119 (36 L.Ed. 368) 12 S.Ct. 659; *Russell v. Mohr-Weil Lbr. Co.,* 102 Ga. 563 (29 S.E. 271); *Paramount Pictures Corp. v. Davis.* 228 Cal. App. 2d. 827, 39 Cal. Rptr. 791; *McCombs v. Merryhew,* 40 Mich. 721; *Nevada Sierra Oil Co. v. Home Oil Co.,* 98 F. 673; *Shapiro v. Wilgas,* 287 U.S.

348, 356 (77 L.Ed. 355) 53 S.Ct. 142, 145 (85 A.L.R. 128); *Harkin v. Brundage, et al.* 13 F.2d. 617, cert. granted, 273 U.S. 682, 47 S.Ct. 237, Rev. 276 U.S. 36 (72 L.Ed. 457) 48 S.Ct. 268; *Nottebaum v. Leckie,* C.C.A. N. Ind. 174; *Riverside v. Dan River Cotton Mills v. Menefee,* 237 U.S. 193 (59 L.Ed. 910) 35 S.Ct. 580; *Hollingsworth v. Barbnur,* 29 U.S. 466, 4 Pet. 460 (7 L.Ed. 922); *Armstrong v. Manzo,* 380 U.S. 545 (14 L.Ed. 62) 85 S.Ct. 1187; *Schroeder v. City of New York,* 83 S.Ct. 279, 371 U.S. 208 (9 L.Ed. 2d. 255); *Covey v. Town of Somers,* 351 U.S. 141 (100 L.Ed. 1021) 76 S.Ct. 724; *Mullane v. Central Hanover Bank and Trust Company,* 339 U.S. 306 (94 L.Ed. 865), 70 S.Ct. 652; *Shelley v. Kramer,* 334 U.S. 1 (92 L.Ed. 1161) 66 S.Ct. 836 (3 A.L.R. 2d. 441); *Griffin v. Griffin,* 327 U.S. 220 (90 L.Ed. 635) 66 S.Ct. 556; *Market Street Railway Company v. Railroad Commission,* 324 U.S. 548 (89 L.Ed. 1171) 65 S.Ct. 770; *Issaia v. Russo-Asiatic Bank,* 155 Misc. 495, 280 N.Y.S. 735; *Koester v. Citizens Pub. Co.,* 154 S.C. (151 S.E. 452); *Murphy v. Murphy,* 214 Ga. 602, 605(2) 106 S.E. 2d. 280; *Western Auto Company v. Holmes, et al.,* 223 Ga. 783 (158 S.E. 2d. 252); *United Bonding Warehouse v. Jackson,* 207 Ga. 627 (63 S.E. 2d. 666).

2. Under the Georgia Law the decision will become the Law of the Case and binding on the trial Court and Appellate Courts in a future trial, even though wrong.

3. The question involved is of gravity and importance in the protection by the United States Constitution of the property rights of a citizen in all State and Federal Trials as regards of the rights of a Defendant to be heard, notified, and confronted with the witnesses

against him in a Civil case involving seizure of his property.

ARGUMENT FOR REASONS FOR ALLOWANCE OF WRIT

1. This Court is not being called upon to decide the sufficiency of the evidence to support the verdict. This is a matter that we concede must be left to the State Courts to decide. However, this Court and the Courts of Georgia have held that depriving a person of his property without notice or hearing, and no compelling reason to do so appearing, that this is a violation of his rights without due process of law. The decision of the Supreme Court of Georgia is contrary to the following decisions: *Carroll v. President & Commissioners of Princess Anne,* 393 U.S. 175 (21 L.Ed. 2d. 325) 89 S.Ct. 347; *Broussard v. Cormier,* 154 La. 877, 98 So. 403; *Eighth Regional War Labor Board v. Humble Oil & Ref. Co.,* 145 F.2d. 462, cert. den. 325 U.S. 883, 89 L.Ed. 1998, 65 S.Ct. 1577; *LaCassagne v. Chapius,* 144 U.S. 119 (36 L.Ed. 368) 12 S.Ct. 659; *Russell v. Mohr-Weil Lbr. Co.,* 102 Ga. 563 (29 S.E. 271); *Paramount Pictures Corp. v. Davis,* 228 Cal. App. 2d. 827, 39 Cal. Rptr. 791; *McCombs v. Merryhew,* 40 Mich. 721; *Nevada Sierra Oil Co. v. Home Oil Co.,* 98 F. 673; *Shapiro v. Wilgas,* 287 U.S. 348, 356 (77 L.Ed. 355) 53 S.Ct. 142, 145 (85 A.L.R. 128); *Marion Mortgage Company, et al. v. Edmunds, et al.,* 64 F.2d. 248; *Harkin v. Brundage, et al.,* 13 F.2d. 617, cert. granted, 273 U.S. 682, 47 S.Ct. 237, Rev. 276 U.S. 36 (72 L.Ed. 457) 48 S.Ct. 268; *Nottebaum v. Leckie,* C.C.A. N.J. 21 F.2d. 556; *State v. Superior Court,* 144 N.E. 747, 197 Ind. 174; *Riverside v. Dan River Cotton Mills v. Menefee,* 237 U.S. 193 (59

L.Ed. 910) 35 S.Ct. 580; *Hollingsworth v. Barbnur,* 29 U.S. 466, 4 Pet. 460 (7 L.Ed. 922); *Armstrong v. Manzo,* 380 U.S. 545 (14 L.Ed. 62) 85 S.Ct. 1187; *Schroeder v. City of New York,* 83 S.Ct. 279, 371 U.S. 208 (9 L.Ed. 2d. 255); *Covey v. Town of Somers,* 351 U.S. 141 (100 L.Ed. 1021) 76 S.Ct. 724; *Mullane v. Central Hanover Bank and Trust Company,* 339 U.S. 306 (94 L.Ed. 865), 70 S.Ct. 652; *Shelley v. Kramer,* 334 U.S. 1 (92 L.Ed. 1161) 68 S.Ct. 836 (3 A.L.R. 2d. 441); *Griffin v. Griffin,* 327 U.S. 220 (90 L.Ed. 635) 66 S.Ct. 556; *Market Street Railway Company v. Railroad Commission,* 324 U.S. 548 (89 L.Ed. 1171) 65 S.Ct. 770; *Issaia v. Russo-Asiatic Bank,* 155 Misc. 495, 280 N.Y. S. 735; *Koester v. Citizens Pub. Co.,* 154 S.C. 154 (151 S.E. 452); *Murphy v. Murphy,* 214 Ga. 602, 605(2) 106 S.E. 2d. 280; *Western Auto Company v. Holmes, et al.,* 223 Ga. 783 (158 S.E. 2d. 252).

In *Carroll v. President & Commissioners of Princess Anne,* 393 U.S. 175 (21 L.Ed. 2d. 325) 89 S.Ct. 347 it was held on page 351 "The ten day order here must be set aside because of a basic infirmity in the procedure by which it was attained. It was issued exparte, without notice to the Petitioners and without any effort, however informal, to invite or permit their participation in the proceedings. There is a place in our jurisprudence for exparte issuance without notice of a temporary restraining order of such duration, but there is no place within the area of basic freedoms guaranteed by the first amendment and such orders where no showing is made that it is impossible to serve or notify the opposing party and to give them an opportunity to participate." This case concerned itself with Amendment I, but we conceive the same reasoning to be true of Amendment XIV.

It has been held that it is a violation of due process to turn one person's property over to another on a petition for a mandatory injunction without first notifying him and giving him an opportunity to be heard, see *Broussard v. Cromier*, 154 La. 877, 98 So. 403; *Eighth Regional War Labor Board v. Humble Oil & Refining Company*, 145 F.2d. 462, cert. den. 325 U.S. 883, 89 L.Ed. 1998, 65 S.Ct. 1577; *LaCassagne v. Chapius*, 144 U.S. 119 (36 L.Ed. 368) 12 S.Ct. 659; *Russell v. Mohr-Weil Lumber Company*, 102 Georgia 563 (29 S.E. 271); *Paramount Pictures Corp. v. Davis*, 228 Cal. App. 2d. 827, 39 Cal. Reporter 791; *McCombs v. Merryhew*, 40 Mich. 721; *Nevada Sierra Oil Company v. Home Oil Company*, 98 F. 673; *Shapiro v. Wilgas*, 287 U.S. 348, 356 (77 L.Ed. 355) 53 S.Ct. 142, 145 (85 A.L.R. 128) it was held that appointments of receiver are not made exparte and without notice: "the remedy in such circumstances is not to be granted loosely, but is to be watched with jealous eyes," *Marion Mortgage Company, et al. v. Edmunds, et al.*, 64 F.2d. 248; *Harkin v. Brundage, et al.*, 13 F.2d. 617, cert. granted, 273 U.S. 682, 47 S.Ct. 237, Rev. 276 U.S. 36 (72 L.Ed. 457) 48 S.Ct. 268, 267 U.S. 36 (72 L.Ed. 457), it has been held that it is a violation of the Fourteenth Amendment to grant injunctions and seize property without notice and held on an exparte order. *Nottebaum v. Leckie*, C.C.A. N.J. 31 F.2d. 556; *State v. Superior Court*, 144 N.E. 747, 197 Ind. 174. In the *Nottebaum* case, it was held (P. 56) "in other words, although the Plaintiff had violated constitutional right of notice the receiver had been illegally appointed, the Defendant's property had been unlawfully seized and taken from him and the exercise of his corporational franchise had been

taken away by injunction, in spite of all of this, the Court decreed that the stockholders and creditors of the Corporation should show cause why the receivers should not be continued as such receivers. The burden of proof was thus shifted from the Plaintiff, where the law placed it, to the Defendant, requiring the latter to undo that which was invalid from the beginning." That case is very much the same as was done in this case. In the *Nottebaum* case an exparte order was granted depriving the Defendant of their property and then requiring them to show cause why the injunctive relief and the appointment of the receivers should not be continued. In this case the same thing was done and although the case was later set down for an interlocutory hearing and heard, it was merely a continuation of the invalid procedure that had proceeded it and the case having been invalid from the beginning the mere technicality of holding a hearing to verify and approve the former invalidity accomplished nothing since it was invalid to begin with and had been from the very beginning.

In *Riverside v. Dan River Cotton Mills versus Menefee,* 237 U.S. 193 (59 L.Ed. 910) 35 S.Ct. 580 it was held "that property condemned without a hearing is repugnant to the due process clause of the Fourteenth needs nothing but statement." To the same effect see also *Hollingsworth v. Barbnur,* 29 U.S. 466, 4 Pet. 460 (7 L.Ed. 922); *Armstrong v. Manzo,* 380 U.S. 545 (14 L.Ed. 62) 85 S.Ct. 1187; *Schroeder v. City of New York,* 83 S.Ct. 279, 371 U.S. 208 (98 L.Ed. 2d. 255); *Covey v. Town of Somers,* 351 U.S. 141 (100 L.Ed. 1021) 76 S.Ct. 724; *Mullane v. Central Hanover Bank & Trust Company,* 339 U.S. 306 (94 L.Ed. 865) 70 S.Ct. 652; *Shelley v. Kramer,* 334 U.S. 1 (92 L.Ed.

1161) 68 S.Ct. 836 (3 A.L.R. 2d. 441); *Griffin v. Griffin,* 327 U.S. 220 (90 L.Ed. 635) 66 S.Ct. 556, it was held; "due process forbids any exercise of Judicial power subsequently affecting a Defendant's rights without notice", see also *Market Street Railway Company v. Railroad Commission,* 324 U.S. 548 (89 L.Ed. 1171) 65 S.Ct. 770; *Cedar Town v. Pickett,* 194 Georgia 508, 22 S.E. 2d. 318; *Issaia v. Russo-Asiatic Bank,* 155 Misc. 495, 280 N.Y.S. 735; *Koester v. Citizens Publishing Company,* 154 S.C. 154 (151 S.E. 452); *Murphy v. Murphy,* 214 Ga. 602, 605(2) 106 S.E. 2d. 280; *United Bonding Warehouse v. Jackson,* 207 Ga. 627 (63 S.Ed. 2d. 666).

It can be seen that the cause of action as filed by the Plaintiff was at best a very weak and unsubstantial one. There is a certain phychological advantage when a Court subsequently takes a matter over, in favor of the prevailing party who has had, as in this case, a special auditor appointed and an injunction granted.

While it is difficult for the petitioner to pursue his regular business when he can not exhibit the products of his work because of this injunction, it is far more destructive for an Auditor to have been appointed to seize and to take the products of his labor. The decision of Judge Etheridge did not appoint an Auditor. The Auditor was appointed at the exparte hearing. The interlocutory order merely modified the exparte order making the original appointment. Therefore, if this order was void abinitio then when modified, it affected anullity.

The decision will be the law of the case.

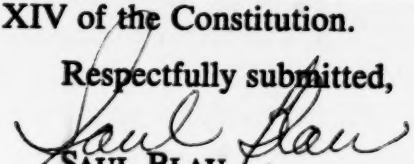
Under Georgia Law an enumeration of errors assigning error on the granting of an injunction and referring

the matter to an auditor for a decision brings the sufficiency of the evidence under review. Furthermore, under Georgia Law, Law of the case rule prevails. *Western Auto Supply Company v. Holmes, et al.*, 223 Ga. 783 (158 S.E. 2d. 252).

CONCLUSION

The Georgia Supreme Court decision and judgment in not reversing the decision of the trial court in the granting of an injunction and appointing an auditor to seize the property of the petitioner without an opportunity to be heard was repugnant to his rights as a citizen under Amendment XIV of the Constitution.

Respectfully submitted,



SAUL BLAU
Attorney for Petitioner

(Decided Nov. 12, 1970)

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APPENDIX A

In the Supreme Court of Georgia

26126. FRANCO v. STEIN STEEL & SUPPLY CO.

1. The allegations in the petition were sufficient to charge the defendant as an officer and agent of the Stein Corporation with operating within the scope of his agency for his own benefit and to the injury and damage of his principal. It was not error to overrule the motion to dismiss the complaint.

2. The temporary restraining order of July 2, 1970, was issued on the allegations verified by the President of Stein and his supporting affidavit which were sufficient to justify the issuance of a temporary injunction and the appointment of a special auditor.

3. Though in some particulars the evidence is in conflict, we cannot say that the trial Judge abused his discretion in granting an interlocutory injunction or continuing the appointment of a "Special Auditor" (Temporary Receiver).

ALMAND, Chief Justice. This appeal is from orders (a) refusing an oral motion to dismiss an equitable petition, (b) granting an interlocutory injunction, and (c) appointing an auditor.

The appellee, Stein Steel & Supply Co., a corporation engaged in the design, fabrication and sale of structural steel, brought its equitable petition against A. M. Franco. It was alleged that Franco, a registered professional engi-

neer in the State of Georgia and other states had been employed by Stein since 1961 as an engineer. It was alleged that:

> "Plaintiff has recently learned that Defendant, for some time — the length of which plaintiff does not know — has been personally billing and receiving payment from plaintiff's customers and potential customers for the services for which Defendant is employed by Plaintiff to perform for such customers.
>
> "On information and belief, Plaintiff alleges that Defendant has not included an appropriate apportionment of his salary and expenses in connection with his duties on behalf of Plaintiff in the total prices of the contracts he has entered into, binding Plaintiff to furnish structural steel items, and as a result Plaintiff has been unable to recover the value of the services performed by Defendant from the customers with whom Defendant has been dealing on behalf of Plaintiff.
>
> "While receiving compensation from Plaintiff, using the materials supplied by Plaintiff, during trips at Plaintiff's expense by virtue of his relationship as an agent and officer of Plaintiff, Defendant has been dealing within the scope of agency for his own benefit to the detriment of Plaintiff.
>
> "As a result of the manner in which Defendant performed his duties for Plaintiff and of Defendant's position of trust and confidence, Defendant has possession of plans, drawings, design calculations, work papers, negotiated proposals, estimates, work sheets, lists of Plaintiff's customers, correspondence and other business records and documents, all in varying stages of development and completion, many of which are Plaintiff's trade secrets and are the only copies or record of such matters. All of these

items are products of Defendant's efforts who was an officer and employee of Plaintiff and are therefore Plaintiff's property.

"Plaintiff fears that Defendant will secrete, destroy, dispose of or divert to his own use Plaintiff's business records and documents in the possession of Defendant or others known to him unless restrained from doing so by this Court. Unless such business records and documents are delivered to Plaintiff or placed in the possession of the Court, Plaintiff will suffer irreparable harm and injury."

The prayers of the petition were (a) to restrain and enjoin Franco from diverting to his own use or divulging to anyone other than a representative of the plaintiff, any plans, drawings and other described articles or destroying such articles; (b) for an accounting to determine the profits obtained by defendant in breach of his duty as agent and officer of Stein; (c) for the appointment of a "special auditor" to take possession of documents and business records, the property of Stein, now in possession of Franco; (d) for judgment in the amount of secret profits, and (e) for other just and proper relief.

On presentation of the complaint to the Court, it (a) granted a temporary restraining order, conditioned upon the plaintiff making a bond in the sum of $1,000.00, and (b) on the supporting affidavit of Milton O. Stein, president of the petitioner, the Court appointed William H. Cate as a special auditor to take possession of certain documents, etc., in the posession, custody or control of the defendant.

The defendant by answer and cross-bill, admitted that he was a registered professional engineer and during the course of his employment by the plaintiff his duties had

increased in importance so that at the present time he held the position of Chief Engineer and Director of Fabrication and is also a Senior Vice-President of the plaintiff. He denied the allegation that he was an employee of the plaintiff, that he has been operating as A. M. Franco Engineers for over 12 years, and that his relation with Stein had been that of consulting engineer. He denied that he had any of the documents, papers, etc., set out in the petition that belonged to Stein, or that he had in his possession any trade secrets of the plaintiff, or that he had destroyed any business records of Stein. By cross-bill he prayed that the petition be dismissed, and he be awarded punitive damages in a named sum and attorneys fees.

After hearing evidence and argument, the Court (a) overruled a motion to dismiss the petition, (b) granted an interlocutory injunction, and (c) continued the appointment of a special auditor.

The defendant Franco filed his notice of appeal and error is enumerated on (a) the order of July 21, 1970, granting an interlocutory injunction, (b) the order of July 2, 1970, granting a temporary injunction, (c) the order appointing a special auditor, (d) the order overruling the motion to dismiss the petition, and (e) that the exparte orders of July 2, granting a temporary injunction and appointing a special auditor "are unconstitutional and contrary to the Fourteenth Amendment to the Constitution, same depriving the defendant of his liberty and property without an opportunity for a hearing."

1. Motion to dismiss petition. *Code Ann.* § 4-205 provides: "The agent shall not make a personal profit from his principal's property; for all such he is bound to account."

The first duty of an agent is that of loyalty to his trust. Within the scope of his agency he cannot engage in the business of his principal for his personal benefit and profit. He cannot have any interest or do any act adverse to the interest of his principal, or which is incompatible with the application of his skill and diligence to the promotion of that interest. He cannot place himself in a position in which his duty and interest conflict with that of his principal, or be permitted to make a secret profit out of his agency. In support of the above see: *Code Ann.* §37-707; *Stover, et al. v. Atlantic Ice & Coal Co.,* 154 Ga. 228 (113 S.E. 802); *Sessions v. Payne & Tye,* 113 Ga. 955 (39 S.E. 325); *Napaer v. Adams,* 166 Ga. 403 (143 S.E. 566); *Forlaw v. Augusta etc. Co.,* 124 Ga. 261(6) (52 S.E. 898).

The trial court in its order overruling the motion to dismiss found that the allegations in the petition were sufficient to charge the defendant as an officer and agent of the Stein Corporation with operating within the scope of his agency for his own benefit and to the injury and damage of his principal.

It was not error to overrule the motion to dismiss the complaint.

2. Assuming, without conceding, that the appellant can enumerate as error the granting, exparte, of a temporary injunction and the appointment of a special auditor, we are of the opinion that the trial court did not err in granting either order.

The Civil Practice Act of 1966 provides: "No temporary restraining order shall be granted without notice to the adverse party unless it clearly appears from specific facts shown by affidavit or by the verified complaint that

immediate and irreparable injury, loss, or damage will result to the applicant before notice can be served and a hearing had thereon."

The temporary restraining order of July 2, 1970, was issued on the allegations verified by the President of Stein and his supporting affidavit which were sufficient to justify the issuance of a temporary injunction and the appointment of a special auditor. The temporary injunction was to remain in effect, "until further order of the Court after said hearing, otherwise to expire on the 2nd day of August, 1970." A hearing was had on July 27, all in compliance with the above quoted Civil Practice Act.

While the Court appointed one who was styled, "Special Auditor", to take possession of certain papers and documents, his duties were that of a Temporary Receiver. The Court had the power to make such appointment. *Code Ann.* § 55-301; *Edwards v. United Food Brokers, Inc.*, 195 Ga. 1, p. 8 (22 SE2d 812): "Thus, if the danger of dissipating assets before an interlocutory hearing can be had is great, the court in the exercise of a sound discretion may, without notice, grant a temporary restraining order or appoint a temporary receiver in order to preserve the status until the interlocutory hearing."

Enumerations of error 2 and 3 are without merit.

3. The trial Judge in his order granting an interlocutory injunction made certain findings of fact. He found that the defendant had in his possession certain documents, the product of his engineering effort; that the evidence supports the contentions of the plaintiff that the defendant, as its officer and agent, required him to furnish his skills and talents for its benefit, the defen-

dant was furnishing his skills and services to others, for which he received compensation, which was not accounted for to the plaintiff and that the defendant admitted he had performed certain engineering services for customers or prospective customers of plaintiff for which he received compensation which he never reported or accounted for to the plaintiff. The trial Judge found from the evidence that the plaintiff's claims were serious and substantial and merited invocation of the equitable powers of the court and if not granted, plaintiff would otherwise suffer irreparable injury.

Though in some particulars the evidence is in conflict, we cannot say that the trial Judge abused his discretion in granting an interlocutory injunction or continuing the appointment of a "Special Auditor" (Temporary Receiver). See: *Parrish v. Rigell, et al.*, 183 Ga. 218, p. 24 (188 S.E. 15).

Judgment affirmed. All the Justices concur.

Thursday, November 12, 1970

A. M. FRANCO v. STEIN STEEL & SUPPLY CO.

This case came before this Court upon an Appeal from the Superior Court of Fulton County, and after argument had it is considered and adjusted that the Judgment of the Court below be affirmed. All the Justices concur.

APPENDIX B

IN THE SUPREME COURT OF GEORGIA

A. M. FRANCO *Appellant* v. STEIN STEEL & SUPPLY CO. *Appellee*	CASE NO. 26126

MOTION FOR REHEARING

Appellant moves for rehearing under Rule XIV of the rules of the Supreme Court of Georgia, and pursuant thereto shows:

1. The Court overlooked several material facts in the record. Bowing to the decision of the Court that there was an agency relationship, and that such relationship requires the utmost fidelity, and that the agent is required to account for the breach of such fidelity, the fact overlooked by the Court concerns the question of what the agency consisted of. The Court seems to be of the opinion that whatever Mr. Franco did during the time he was employed by the corporation, that involved engineering services involved his agency relationship. This is wrong. The allegations of the petition (R.1-6) define and refer to the appellant's duties as being confined with engineering services within the steel fabrication and supply business. See particularly paragraph 16 of the petition, and the words "binding Plaintiff to furnish structural steel items" The affidavit upon the question given by Mr. Stein (R.8) states "As part of these negotiations and proposals, Aaron M. Franco prepared or supervised

the preparation of, design of the structural steel for a certain project to be built by or for Litton Industries, Inc. known as the New Britain job." Nowhere, in the pleadings or the evidence is the scope of his agency enlarged further than this. Yet, Judge Etheridge in reaching his decision indicated that he was broadening his concept of this agency (T.73) "Specifically, do you have any materials or any engineering work that has been done by you since the time of your employment, the beginning of your employment with Stein Steel? I'm not talking about steel work. I'm talking about work that you were doing as an engineer . . ." The evidence by Mr. Franco is uncontradicted (T.99, 100), that his agency duties did not include concrete, wood, timber design, soil analysis, paving design, hydraulics, or anything except structural steel design, and that he made no charges for any structural steel design.

We do not of course contend that if Mr. Franco did have any material belonging to the corporation, that it should not be returned, or that he should not be restrained from destroying secreting or disposing of such. However, the order of the Court is much broader than this. It reads (R.16) "Since defendant may have documents of a si .lar nature, it is necessary and appropriate that a careful study of any such documents be made. Now, therefore, it is ordered that William H. Cate, 904 Standard Federal Bldg. Atlanta, Ga. is hereby appointed as a special auditor to take possession of all documents, writings and records *of whatsoever nature* which are in the possession, custody or control, of defendant which contain information about, or relate to, the business of the plaintiff or *any* engineering services that defendant or others under his direction or in his employ, may have

performed *for anyone* during the period of time that defendant was in the employ of plaintiff." Judge Etheridge held (R.40) "For the purposes of ruling upon plaintiff's prayer for interlocutory injunction, the Court is not required to, and does not, make a determination of the issues inherent in the contentions of the respective parties . . ." Yet the Court saw fit to continue the order appointing the special receiver (R.42), which brings us to the second ground of our motion.

The Court overlooked a statute and a decision which is controlling as authority and which would require a different judgment from that rendered. As pointed out above the lower court made no determination of the issues. This court in the last paragraph of its decision pointed out that in some particulars the evidence was in conflict. In the *Parrish* case cited in the opinion the court made a finding of fact and that there was an emergency. This Court cites as authority Code Ann. § 55-301. But it overlooks Code Ann. § 55-303—"The power of appointing receivers should be prudently and cautiously exercised, and except in clear and urgent cases should not be resorted to." In our opinion we have never seen a more imprudent and uncautious exercise of the power, in such an unclear and non urgent case. Discretion can be an oppression. See (R.42) which refer to reflection of *"engineering services* performed by defendant or others under his direction or in his employ, during the period that defendant has been employed by plaintiff, and *which defendant claims not to be the property of plaintiff and not to be connected with his employment by plaintiff."* (All italic above supplied by us, for the purpose of emphasis). This, particularly in view that the plaintiff only complained of payment by Litton Indus-

tries, and no other persons or firms. It is the obvious intention of the Court, that based on a suspicion generated by the accidental receipt of a check from Litton Industries to Franco, that it is willing to turn over the entire business and property of Mr. Franco for a searching analysis of whether there has been any wrongdoing by Mr. Franco without any previous finding of fact that there has been any. We cannot agree with this Court that the nature of the order is the appointing of a temporary receiver merely to hold assets subject to the order of the Court. The order of the Court (R.17) was to examine the documents "hear evidence as may be necessary to determine the ownership of such records, documents and writings, and shall so inform the parties hereto of his decision." If this Court is correct in interpreting the order of the lower court as an order appointing a temporary receiver, it has obviously overlooked Ga. Code Ann. § 37-1101—"At any stage in the progress of a cause for equitable relief, if any portion of the same shall be ready for or require a decree, the court may hear and determine such matters, and pass such interlocutory decree or order as may advance the cause, and expedite a final hearing. If no issue of fact shall be involved, the verdict of a jury shall be unnecessary." In *James v. Parks,* receiver (145 Ga. 356, 89 S.E. 333) it was held: "Where a plaintiff files a petition against a defendant, praying for the appointment of a receiver and for the impressment of a trust upon specific property in the possession of the defendant, and the court on interlocutory hearing files to appoint a receiver, but enjoins the defendant from disposing of the specific property except by approval of the court, it is erroneous for the court by subsequent interlocutory judgment to peremptorily

order the defendant to deliver to the plaintiff the property in question, in advance of an adjudication of the issue as to the ownership of the property by the contending parties. . . ." In the case at bar the order was to deliver first, and to determine the ownership later, pretermitting the question of whether the defendant had the right to have this determined by a jury. In the case of *Murphy v. Murphy,* 214 Ga. 602, 605(2), S.E., it was held: "The record in this case shows that the ex parte orders or judgments excepted to are void. Being directly interested in the proceeds derived from the insurance policies and the partnership realty which the defendant was authorized to sell at private sale, the plaintiffs were entitled to notice of any application affecting a change in the status of either and an opportunity to be heard in opposition to the order or judgment prayed for. Where, as here a party is being divested of property rights by a proceeding instituted by an opposite party to the cause, *nothing short* of notice of the proceeding and an opportunity to be heard in opposition thereto will satisfy the due-process clauses of the Constitutions of this State and of the United States. This ought to be and is elementary." That case also came up on a judgment pursuant to a hearing had after an exparte order without notice. The writer of this decision, Hon. Bond Almand also participated and concurred in the Murphy decision. This decision and the theory behind it may also have influenced the drawing of Code Ann. § 81A-165—"*No* temporary restraining order shall be granted without notice to adverse party unless it *clearly* appears from specific facts shown by affidavit or by the verified complaint that immediate and irre-

parable injury, loss or damage will result to the applicant before notice can be served and a hearing had thereon."

The defendant was a resident of Fulton County. There was no showing by the pleadings or the affidavit or the evidence that he could not be called by phone, or otherwise notified. The allegations as to irreparable injury, loss or damage *to be* suffered were no better than conclusions. At this late date, from the evidence, this writer is at a complete loss to understand how, at the time of the original hearing, the plaintiff was about to suffer irreparable damage, or that at the time of the hearing that he had avoided the suffering of irreparable injury. The Court must now understand that the temporary receiver was not appointed at the interlocutory hearing, but at the exparte hearing, and the mere fact that there was an interlocutory hearing does not breathe constitutional validity into an invalid, void and oppressive order.

We therefore respectfully submit that a rehearing be granted.

/s/ SAUL BLAU

SAUL BLAU,
CHARLIE FRANCO

I hereby certify that I have served a copy of the foregoing motion for a rehearing on counsel for appellee, to wit:

WILLIAM R. KING
HAAS, HOLLAND, FREEMAN, LEVISON
& GIBERT
2709 First National Bank Tower
Atlanta, Georgia 30303

through the U.S. Mail in an envelope properly addressed with sufficient postage thereon.

This 22nd day of November, 1970.

/s/ SAUL BLAU

SAUL BLAU
Atty. for Appellant
1422 First National Bank Bldg.
Atlanta, Georgia 30303

ORDER DENYING PETITION FOR REHEARING

SUPREME COURT OF GEORGIA

Atlanta, December 17, 1970

The Honorable Supreme Court met pursuant to adjournment. The following order was passed: *A. M. Franco v. Stein Steel & Supply Company*. Upon consideration of the motion for a rehearing filed in this case, it is ordered that it be hereby denied.

FELTON, J. Dissents

APPENDIX C

IN THE SUPERIOR COURT OF
FULTON COUNTY
STATE OF GEORGIA

STEIN STEEL & SUPPLY CO., a corporation, *plaintiff,* vs. A. M. FRANCO, *defendant,*	CIVIL ACTION FILE NO. B-56642

TEMPORARY RESTRAINING ORDER

Having read and considered the verified complaint herein, and the affidavit of the president of the plaintiff herein, it is

ORDERED that defendant, his agents, servants, employees and everyone acting in active consort or participation with them are hereby enjoined and restrained from destroying or disposing of in any manner, copying, diverting for their own use, or divulging to anyone other than a representative of plaintiff, any plans, drawings, reproducibles, estimates, design data, calculations, correspondence, contracts, proposals, agreements, memoranda, work sheets, work papers, customers lists, or any other written or pictorial documents which are the property of the plaintiff, and

From secreting, destroying, or disposing of in any

manner, any plans, drawings, reproducibles, estimates, design data, calculations, correspondence, contracts, proposals, agreements, memoranda, work sheets, work papers, customers lists, or any other written or pictorial documents (if any) which reflect engineering services performed by defendant, or others under his direction or in his employ, during the period that defendant has been employed by plaintiff, which defendant claims not to be property of the plaintiff and not connected with his employment by plaintiff.

Plaintiff shall post bond, conditioned upon paying to defendant such damages, not exceeding the sum of 1,000.00 as he may sustain by reason of this temporary restraining order if it shall be finally decided that plaintiff is not entitled thereto.

AND IT IS FURTHER ORDERED, that a hearing upon plaintiff's request for interlocutory injunction shall be set for the 21st day of July, 1970, before the presiding Judge and this temporary restraining order to remain in effect until further order of the Court after said hearing, otherwise to expire on the 2nd day of August, 1970.

/s/ CHARLES A. WOFFORD

Judge
Atlanta Judicial Circuit

ISSUED THIS 2nd day

of July, 1970, at

11 o'clock, a.m.

GEORGIA, FULTON COUNTY

I have this day served upon the defendant, A. M. FRANCO, a copy of the within Order by_____.

THIS the_____day of July, 1970.

_____

Deputy Sheriff

4C

IN THE SUPERIOR COURT OF
FULTON COUNTY
STATE OF GEORGIA

STEIN STEEL & SUPPLY CO., a corporation, *Plaintiff,* vs. A. M. FRANCO, *Defendant.*	CIVIL ACTION FILE NO. B-56642

ORDER APPOINTING AUDITOR

Having read and considered the verified complaint herein and the affidavit of the president of plaintiff corporation, the Court is of the opinion that the business records, documents, drawings, plans, and other similar such writings, which are the property of plaintiff but are in the possession of the defendant, are essential to the proper conduct of plaintiff's business and that the same should be protected from loss or destruction. Since defendant may have documents of a similar nature, it is necessary and appropriate that a careful study of any such documents be made.

NOW, THEREFORE, IT IS ORDERED that William H. Cate, 904 Standard Federal Bldg., Atlanta, Ga. is hereby appointed as a special auditor to take possession of all documents, writings and records of whatsoever nature which are in the possession, custody or control, of defendant which contain information about, or relate to, the business of the plaintiff or any engineering services that defendant, or others under his di-

rection or in his employ, may have performed for anyone during the period of time that defendant was in the employ of plaintiff.

IT IS FURTHER ORDERED, that defendant, immediately upon personal service hereof, produce at a place designated by said auditor all such documents, records and writings in his power, and

IT IS FURTHER ORDERED, that when such records, documents and writings are produced before said auditor, he shall at a time and place to be designated by him, within seven (7) days after taking possession, examine the same and hear evidence as may be necessary to determine the ownership of such records, documents and writings, and shall so inform the parties hereto of his decision. In the event that the parties shall not agree with the decision of said auditor with regard to any specific document, record or writing, said auditor shall report to this Court in the manner provided in Chapter 10-2, Ga. Code Ann.

This the 2nd day of July, 1970.

/s/ CHARLES A. WOFFORD

Judge
Atlanta Judicial Circuit

GEORGIA, FULTON COUNTY.

I have this day served the Defendant, A. M. Franco, personally with a copy of the within complaint and summons and order.

This July 6, 1970.

/s/ FOWLER LANE

Deputy Sheriff

IN THE SUPERIOR COURT FOR THE
COUNTY OF FULTON
STATE OF GEORGIA

STEIN STEEL & SUPPLY CO., a corporation,

Plaintiff

vs.

A. M. FRANCO,

Defendant

CIVIL ACTION FILE NO. B-56642

AUDITOR'S REPORT

Pursuant to an order entered in this Court on July 2, 1970, the undersigned was appointed special auditor to take possession of all documents, writings, and records of whatsoever nature which are in the possession, custody or control of defendant which contain information about, or relate to, the business of the plaintiff or any engineering services that defendant, or others under his direction or in his employ, may have performed for anyone during the period of time that the defendant was in the employ of plaintiff.

The order further provided that defendant immediately upon personal service of the summons and order appointing the auditor, produce at a place designated by me all such documents, records, and writings. The order further provided that the undersigned, as auditor, would designate a time and place within seven (7) days after taking possession, to examine the same and hear any

evidence as may be necessary to determine the ownership of such records, documents and writings, and shall so inform the parties hereto of his decision.

Pursuant to the order, a hearing was held at the offices of Haas, Holland, Levinson, Freeman & Gibert, Attorneys at Law, 2709 First National Bank Tower, Atlanta, Georgia, on Monday, July 13, 1970. Appearances: William King, Esq., Counsel for plaintiff, Charles Franco, Esq., Counsel for defendant, the defendant in person and Mr. Milton Stein, of Stein Steel & Supply Co.

The defendant, Aaron Franco, had in his possession certain shop drawings which were identified and examined by all parties present. It was stipulated that these shop drawings were the property of Stein Steel & Supply Co., and had been made by the defendant, Aaron Franco, pursuant to plans which had been submitted to him by Algernon-Blair under the terms of a certain contract between the latter two parties.

Mr. King in opening the hearing stated that this was the first meeting pursuant to the order of July 2, 1970. He asked Mr. Charles Franco, Attorney for the defendant, if there were any other documents, writings, or materials other than those which had been brought to the hearing. Mr. Franco responded that there were no other materials, writings, or documents in his possession or in the possession of his client, belonging to Stein Steel & Supply Co. The defendant, Aaron Franco, was thence sworn and examined by Mr. King. As to all questions put to Mr. Franco concerning any other writings, documents, drawings, or other materials, except those which were presented at the hearing, the defendant answered as follows:

> "I refuse to answer on the grounds that this may tend to incriminate me and work a forfeiture on my estate."

Reference was made to the case of *Townsend v. Northcutt*, 121, Ga. App. 220.

As to the shop drawings which had been brought to the hearing, the defendant, Aaron Franco testified that he did not have a set of the original plans which had been prepared by Algernon-Blair, but that the shop drawings had been made pursuant to said plans, and that the original thereof had been returned to Algernon-Blair. The defendant as the undersigned understood his testimony, was to examine said plans, mark them approved or disapproved or returned for correction.

There were all of the questions propounded to the defendant, Aaron Franco. Mr. King then stated for the record that the plans and shop drawings which had been brought to the hearing of the defendant, may be returned to Mr. Franco, the defendant, to be used for any purpose.

Mr. King stated further that he was of the opinion that the defendant had other records, writings, drawings, etc., which belonged to the plaintiff.

In response thereto Mr. Charles Franco, Attorney for the defendant, stated that the plaintiff was on a fishing expedition; that these proceedings had been instituted for the purpose of harassing the defendant; that the plaintiff had brought other suits of this nature for this purpose. He stated further that he had no objection to the auditor examining any of the records or files of the defendant; however, he would object to the auditor making a record of these documents or filing same with the

court, for the reason that the plaintiff would use the information gained thereby to the detriment of the defendant.

Mr. King then asked the defendant and his counsel if it was their position that the records did not belong to Stein Steel & Supply Co., or whether or not there were such records, the answer was the same as above:

> "I refuse to answer on the grounds that this may tend to incriminate me and work a forfeiture on my estate."

These were all of the proceedings had at said hearing.

Respectfully submitted,

By: /s/ WILLIAM H. CATE

WILLIAM H. CATE,
Special Auditor

GEORGIA, Fulton County,

Clerk's Office Superior Court

Filed for Record 14 day of July, 1970.

Recorded July 15, 1970.

J. W. ....., Clerk

Filed in office July 14, 1970

W. M. CALLAWAY

Deputy Clerk Superior Court

Fulton County, Georgia

APPENDIX D

IN THE SUPERIOR COURT OF FULTON COUNTY
STATE OF GEORGIA

STEIN STEEL & SUPPLY CO., a corporation, *plaintiff,* vs. A. M. FRANCO, *defendant.*	CIVIL ACTION FILE NO. B-56642

ORDER

Plaintiff's prayer for interlocutory injunction came on for hearing before me on July 21, 1970, at one o'clock p.m.

I.

At the outset, counsel for the defendant made what the Court construes to be an oral motion to dismiss for failure to state a claim upon which relief can be granted. After reading the complaint and hearing arguments of counsel, I am of the opinion that the allegations of the complaint are clearly sufficient to charge that the defendant operated within the scope of his agency for his own benefit. Assuming those charges to be true, as must be done in considering such motion, the Court could clearly grant relief to the extent plaintiff has been damaged by such conduct. Therefore, DEFENDANT'S MOTION TO DISMISS IS DENIED.

II.

After considering the verified pleadings, the affidavits and testimony of defendant and plaintiff's president, the Court finds that the defendant has possession of certain documents and records which are the product of and reflect defendant's engineering efforts. The plaintiff contends that defendant's job duties and responsibilities required him to furnish his engineering skills and talents to plaintiff for its benefit and that instead, while employed by plaintiff, using plaintiff's supplies, and the services of other engineers paid for by plaintiff, defendant was furnishing his skills and services to others for his own benefit. Plaintiff further contends that a part of its business is to furnish certain design and other engineering services to its customers or prospective customers for which a charge is included in the price to the customers and that defendant performed the same service for plaintiff's customers and prospective customers and received compensation directly for such services.

Defendant admits that he has performed certain engineering services for customers or prospective customers of plaintiff; that he received compensation therefor and that he never told any representative of plaintiff about those activities. He contends, however, that he has been openly engaged in the business of a consulting engineer for the entire time he has been employed by plaintiff and that plaintiff's officers knew or should have known about his activities. He further contends that the engineering services for which he has received payment from plaintiff's customers and prospective customers were not of the same character as those he performed for the plaintiff.

For the purposes of ruling upon plaintiff's prayer for interlocutory injunction, the Court is not required to, and does not, make a determination of the issues inherent in the contentions of the respective parties. The court does find from the evidence presented that the plaintiff's claims are serious and substantial and merit invocation of the equitable powers of this Court if plaintiff would otherwise suffer irreparable injury.

The Court finds from the evidence that the defendant had important and responsible duties within the organization of plaintiff with authority to deal on behalf of plaintiff in all matters involving engineering services required of or by plaintiff. At the time of termination, defendant was a senior vice president of plaintiff and had held said office since 1966.

The equitable powers of a Court are particularly appropriate where an agent in whom trust and confidence has been placed is alleged to have violated that relationship to his benefit and the damage of the principal. In the opinion of the Court, plaintiff makes out such a case here. It would be manifestly inequitable for the defendant to retain or destroy the products of his efforts for which plaintiff has paid or to be allowed to hide or destroy the records which evidence the extent of his transactions for his own benefit. Balancing of the equities weighs heavily in plaintiff's favor.

The Order plaintiff seeks prohibits the defendant from destroying or converting to his own use certain categories of documents which are a part of the subject matter of the suit. Plaintiff seeks to preserve the status quo until the issues can be determined in the normal course. That is the proper function of an interlocutory injunction.

Furthermore, the subject matter to be preserved by the injunction has a value to plaintiff which would be impossible to accurately assess in terms of damages and to restrict the plaintiff to damages in such instance would result in an inadequate remedy. It is therefore,

ORDERED: Until further order of this Court, the defendant, his agents, servants, employees and everyone acting in active consort or participation with them are hereby enjoined and restrained from destroying or disposing of in any manner, copying, diverting for their own use, or divulging to anyone other than a representative of plaintiff, any plans, drawings, reproducibles, estimates, design data, calculations, correspondence, contracts, proposals, agreements, memoranda, work sheets, work papers, customers lists, or any other written or pictorial documents which are the property of the plaintiff, and

From secreting, destroying, or disposing of in any manner, any plans, drawings, reproducibles, estimates, design data, calculations, correspondence, contracts, proposals, agreements, memoranda, work sheets, work papers, or any other written or pictorial documents (if any) which reflect engineering services performed by defendant, or others under his direction or in his employ, during the period that defendant has been employed by plaintiff, and which defendant claims not to be the property of plaintiff and not to be connected with his employment by plaintiff.

The bond heretofore filed by plaintiff is deemed sufficient and is applicable to this injunction.

III.

Defendant contends that compliance with the Order of July 2, 1970 issued by the Honorable Charles A. Woford appointing an auditor would put defendant out of business. Therefore, it is

ORDERED, that the July 2, 1970 Order of the Honorable Charles A. Wofford appointing William H. Cate as auditor is modified as follows:

Those records of defendant which are not current records and are not needed in the usual and ordinary course of defendant's business shall be subject to the provisions of said Order as written. Those records which defendant needs in the usual and ordinary course of his business shall be inventoried and listed; said listing to be furnished immediately to the auditor. Should there be any contention between the respective parties as to the ownership of any of the records listed, the defendant may furnish the auditor with copies of such records rather than the originals. The cost of copying the same to be charged as a cost of the litigation and included as part of the judgment of this proceeding.

This 21 day of July, 1970.

/s/ JACK ETHERIDGE

JACK ETHERIDGE
Judge, Superior Court for Fulton
County, Atlanta Judicial Circuit

Filed in office Jul 27 1970
WALTER W. MILES
Deputy Clerk Superior Court
Fulton County, Georgia

26126

APPENDIX E

SUPREME COURT OF GEORGIA

Atlanta, December 23, 1970

The Honorable Supreme Court met pursuant to adjournment.

By Chief Justice Almand:

The following direction was given:

A. M. FRANCO v. STEIN STEEL & SUPPLY COMPANY

Upon consideration of the motion of the appellant for a stay of this court's remittitur in order that he may file in the Supreme Court of the United States an application for certiorari to obtain a review of this court's judgment rendered in this case on December 17, 1970, such motion is hereby granted subject to the following conditions:

The clerk of this court is directed to withhold the transmittal of such remittitur to the trial court for ninety days from December 17, 1970, and until the final disposition of the said case by that court; Provided that promptly upon the filing of such application in the Supreme Court of the United States, counsel for the applicant shall notify the clerk of this court thereof in writing and also shall promptly notify the clerk of this court of any judgment of that court denying such application, or, if no such application be filed in that court within the said ninety day period or within an authorized extension thereof,

counsel for applicant shall in writing promptly so notify the clerk of this court.

B_____ ALMAND
Chief Justice

SUPREME COURT OF THE STATE OF GEORGIA,

CLERK'S OFFICE

Atlanta, Dec. 23, 1970

Witness my signature and the seal of said court hereto affixed the day and year last above written.

HAZEL E. HALLFORD
Deputy Clerk.

CERTIFICATE OF SERVICE

I certify that on 9th day of March, 1971 that I have mailed a copy of the foregoing petition and appendix to counsel for respondent, Mr. William R. King, Haas, Holland, Freeman, Levison & Gibert, 2709 First National Bank Tower, Atlanta, Georgia 30303, postage prepaid.

SAUL BLAU
Attorney for Petitioner

1422 First National Bank Tower
Atlanta, Georgia
Phone 525-2869 (Area Code 404)

LIBRARY
SUPREME COURT, U. S.

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1970

No. 1465

A. M. FRANCO,
Petitioner,

versus

STEIN STEEL & SUPPLY COMPANY,
Respondent.

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF GEORGIA

EDWARD L. GREENBLATT
THEODORE G. FRANKEL
HAAS, HOLLAND, FREEMAN, LEVISON & GILBERT
2709 First National Bank Tower
Atlanta, Georgia 30303
Attorneys for Respondent

St. Louis Law Printing Co., Inc., 411-15 N. Eighth St. [illegible]

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Pope v. Atlantic Coast Line Railroad Co., 345 US 379, 97 L.Ed. 1094, 73 S. Ct. 749 (1953) 6

Rice v. Sioux City Memorial Park Cemetery, 349 U.S. 70, 99 L. Ed. 897, 75 S. Ct. 614 (1955) 4

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Statutes Cited

28 USCA, § 1257 ..... 2, 3, 5, 6

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Text Cited

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IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1970

No. 1465

A. M. FRANCO,
Petitioner,

versus

STEIN STEEL & SUPPLY COMPANY,
Respondent.

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF GEORGIA

OPINIONS BELOW

The opinion of the Supreme Court of Georgia is reported at 227 Ga. 92 (App. A of Petition). The Motion for Rehearing and decision thereon are appended to the petition (App. B). The Judgment of the Superior Court of Fulton County, Georgia, is appended to the petition (App. C & D). The stay of the remittitur is appended to the petition (App. E).

JURISDICTION

The jurisdictional requisite as set forth in the petition is insufficient as discussed in argument, Section B, infra.

QUESTIONS PRESENTED

1. Does the petition present any special or important reasons for review?

2. Is the order from which review is sought final within the meaning of 28 USCA, § 1257?

3. Are the questions raised herein moot?

4. Have petitioner's 14th Amendment rights been violated?

5. Has petitioner waived any rights with respect to the challenged order?

CONSTITUTIONAL PROVISIONS INVOLVED

The Constitutional provisions are adequately set forth in the petition.

STATEMENT OF THE CASE

The statement of facts as stated in the petition is inaccurate in the following respects:

(a) There was an adequate reason for failure to notify petitioner of the entry of the July 2, 1970 orders;

(b) Petitioner failed to comply with the July 2, 1970 ex parte orders of which he now complains; and,

(c) Petitioner, not the Supreme Court of Georgia, as petitioner implies, relied upon the case **Murphy v. Murphy**, 214 Ga. 602 on the motion for rehearing.

I

SUMMARY OF REASONS FOR REFUSAL OF THE WRIT

The petition for a writ of certiorari should be denied for the following reasons:

(a) The petition does not present any special or important reasons for granting review in that:

(1) The question is merely of interest to the litigants; and

(2) The question is an episodic one not of constitutional dimensions.

(b) The order sought to be reviewed is not a final order and therefore not reviewable pursuant to 28 USCA, § 1257.

(c) The issue raised in the petition is moot and need not be considered;

(d) There has been no violation of any federally protected right; and

(e) If this Honorable Court is of the opinion that the order in question did violate petitioner's federally protected rights, petitioner has waived the same by failing to assert them in a timely manner.

II

ARGUMENT

(A)

The petitioner raises no issues meriting consideration and review should not be granted. This Honorable Court is the primary overseer of matters of federal law and national import. **State of Ohio v. Wyandotte Chemical Corporation, et al,** ... U.S. ..., 39 L. Week 4323 [No. 41, October Term, 1970; decided March 23, 1971]. A petition for writ of certiorari is not a normal appellate channel to be resorted to by litigants who seek a determination on their case by the highest Court of this land. **Magnum Import Co. v. De Sportuno Coty,** 262 US 159, 67 L. Ed. 922, 43 S. Ct. 531 (1923). A principal purpose of the Congressional authority[1] affecting review by this Honorable Court was to lessen the burden of this Honorable Court and to put the Court in control of its own docket by restricting the number of cases which fall before this Court for review. **Wright, Handbook of the Law of Federal Courts,** §105 (2d ed. 1970).

With the passage of the Judges Bill of 1925, Rule 19 was promulgated to guide the Court and litigants as to the Court's standards for granting writ of certiorari. **Faye v. Noia,** 372 US 391, 9 L. Ed. 2d 837, 83 S. Ct. 822 (1963). The predominate criteria under Rule 19, is whether or not the petition presents any special and important reasons for granting the writ. **Faye v. Noia,** *supra.* In interpreting the guidelines, this Court in **Rice v. Sioux City Memorial Park Cemetery,** 349 U.S. 70, 99 L. Ed. 897, 75 S. Ct. 614 (1955), stated:

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[1] Evarts Act of 1891, creating the various United States Courts of Appeals; the Judicial Code of 1911, abolishing the "old" circuit courts; and the Judges Bill of 1925, limiting appeals to this Honorable Court, and substituting the discretionary writ of certiorari.

> "A federal question raised by a petitioner may be 'of substance' in the sense that, abstractly considered, it may present an intellectually interesting and solid problem but this Court does not sit to satisfy a scholarly interest in such issues. Nor does it sit for the benefit of particular litigants [citations]. Special and important reasons imply a reach to the problem beyond the academic or the episodic. This is especially true when the issues involved reach constitutional dimensions, for there comes into play regard for the Court's duty to avoid decisions and constitutional issues unless avoidance becomes evasion."

The Rule and the decisions of this Honorable Court clearly reflect that the granting of review is to settle issues of public importance and not merely to resolve a dispute between the parties. **Love & Ballor Corp. v. Western Well Works, Inc.**, 261 US 387, 67 L. Ed. 712, 43 S. Ct. 422 (1923).

The question then is what special and important reasons warrant review. As the special and important reason for review, petitioner asserts that he is being subjected to a psychological disadvantage in a weak case and therefore the order complained of should not have been entered (**Petitioner's Brief**, p. 12). It is clear that petitioner's assertions are related only to his private rights now in dispute. There is no substantial public issue which presents any special or important reason for review, and therefore the petition should be denied.

(B)

The challenged order is not a final order within the meaning of 28 USCA, § 1257, and should not be reviewed. Review by way of certiorari to the highest courts of the states is limited to final orders, judgments or decrees. 28

USCA, § 1257. The requirement of a final order is more than a technical rule of procedure yielding where necessary to the exigencies of particular situations. It represents a longstanding and healthy policy of abstention which protects litigants and courts from the disruption of interlocutory review. It further restrains this Honorable Court from passing on Constitutional questions that may dissipate by the final outcome of the case and thereby minimize undesirable federal-state conflicts. **Mercantile National Bank v. Langdeau**, 371 US 555, 9 L.Ed. 2d 523, 534, 83 S. Ct. 520 (1963) (Justice Harlan, dissent).

The issue presented to this Court is not raised by a final order under federal standards. The issue does not turn on the jurisdiction or venue of the Court below. See **Local No. 438 v. Curry**, 371 US 542, 9 L.Ed. 2d 514, 83 S. Ct. 531 (1963); **Mercantile National Bank v. Langdeau**, *supra*. Here, regardless of this Honorable Court's determination, the state trial court has jurisdiction over the subject matter of this cause and over the person of petitioner. Even if the Court below erred, the case will go forward. The litigants do not face the risk of finding their efforts nullified by improper jurisdiction nor would they be required to relitigate the cause if the order below were ultimately found erroneously entered. Petitioner does not assert that he has no further defense and therefore, as a practical matter, the order is final. See **Pope v. Atlantic Coast Line Railroad Co.**, 345 US 379, 97 L. Ed. 1094, 73 S. Ct. 749 (1953). Nor does petitioner assert that the order below effectively terminates the litigation. See **Amalgamated Food Employee Union Local 590 v. Logan Valley Plaza**, 391 US 308, 20 L. Ed. 2d 603, 88 S. Ct. 1601 (1968).

The order before this Honorable Court is clearly interlocutory under federal standards. The statute requiring final orders is designed to avoid piecemeal review of

interlocutory orders. This Honorable Court throughout its history has regularly and continuously declined review in cases as the instant case. **Montgomery Building and Construction Trades Council v. Ledbetter Erection Co., Inc.**, 344 US 178, 97 L. Ed. 204, 73 S. Ct. 196 (1952). The requirement of finality has remained as a part of our working system of jurisprudence since the passage of the Judiciary Act of 1789, 1 Stat. 85, § 25. See **Ledbetter**, *supra*. The temporary restraining order entered in the instant case, as an order denying a demurrer, is an interlocutory order and therefore not subject to review. See **Whitus v. Georgia**, 385 US 545, 17 L. Ed. 2d 599, 87 S. Ct. 643 (1967).

(C)

The issue raised by the petition is moot. Petitioner contends that his rights of due process and equal protection were violated when the trial court entered an ex parte order requiring him to turn over certain papers, the ownership of which were in controversy, to a special auditor (and receiver) who would in turn hear evidence with respect to the same. The order entered July 2, 1970, required petitioner to turn over records to the auditor which were owned by your respondent or which were prepared by petitioner in violation of his fiduciary duty to your respondent. At a hearing before the auditor, petitioner appeared without objection and produced certain records which respondent stipulated could be retained by petitioner. Petitioner refused to produce other records which were within the ambit of the July 2, 1970, order. No effort was made to cite petitioner for contempt in regard to said order. Instead, on July 21, 1970, this cause came on to be heard after due notice at which time petitioner was heard. At that hearing, which was also in the nature of a temporary restraining order, the order of

reference was modified pursuant to petitioner's request whereby petitioner was allowed to retain records which he claimed were necessary in the ordinary operation of his business. No objection as to notice was made at that time.

Petitioner does not assert that a reference of the cause violates any constitutional right but merely that the order of reference by reason of its ex parte nature was unconstitutional. It is clear, however, that this issue is now moot in that petitioner received notice and had an adequate opportunity to be heard on the propriety of the reference. **Mitchell v. Hayden, Stone, Inc.**, 225 Ga. 711 (1969).

The mootness doctrine stems from the constitutional requirement under Article III of the Constitution of the United States wherein the exercise of judicial powers is limited to actual cases or controversies. **Liner v. Jafco, Inc.**, 375 US 301, 11 L. Ed. 2d 347, 84 S. Ct. 391 (1964). Unlike **Carroll v. President & Commissioners of Princess Anne**, 393 US 175, 21 L. Ed. 2d 325, 89 S. Ct. 347 (1968) where the petitioners were regularly faced with the impediments by reason of then expired temporary restraining order, there is no continuing effect in the instant case. At no time prior to said hearing was petitioner in any way affected by said order—other than his mere appearance before the auditor. Petitioner was afforded notice and an opportunity to be heard with respect to the order in question. As a direct result, the order was modified to permit petitioner to operate his business. Therefore, the ex parte character of the original order was therefore clearly merged into the July 21, 1970, order of modification. It is absolutely clear that the issues in the instant case have progressed to a point where the order petitioned from is merely a whisper from the past arousing an old, almost forgotten, memory. The order, in short, is moot.

(D)

The order appealed from did not violate petitioner's Constitutional rights. Petitioner relies upon **Mullane v. Central Hanover Bank and Trust Co.**, 339 U.S. 306, 94 L. Ed. 865, 70 S. Ct. 652 (1960). The case stands for the proposition that due process precludes the taking of property without notice and an opportunity to be heard and that the notice afforded must be reasonably calculated to inform. **Mullane** was clarified in **Schroeder v. New York**, 371 U.S. 208, 9 L. Ed. 2d 255, 83 S. Ct. 279 (1962) where this Honorable Court indicated that due process required adequate notice and an opportunity to be heard before the proceeding could be afforded any finality. Certain forms of pre-judgment interference with property prior to notice and hearing are permissible, i.e., attachment or replevin. See **Rothschild v. Knight**, 184 U.S. 334, 46 L. Ed. 573, 22 S. Ct. 391 (1902); **Phillips v. Commissioner of Internal Revenue**, 283 U.S. 589, 75 L. Ed. 1289, 51 S. Ct. 608 (1931). See also **Huron Holding Corp. v. Lincoln Mine Operating Co.**, 312 U.S. 183, 85 L. Ed. 725, 61 S. Ct. 513 (1941).

There are several important factors which should compel this Honorable Court to deny certiorari. First, the order of reference did not deprive petitioner of any property or use thereof without and prior notice or an opportunity to be heard. Petitioner was afforded ample notice to appear and present evidence with respect to ownership of the documents involved. Further, the record amply reflects no property was, in fact, ever taken from him. Finally, special circumstances were presented before the trial court in granting the order. Petitioner had regularly and wrongfully violated his fiduciary duty to Respondent. The record reflects diversion of business for petitioner's personal gain and retention of property belonging to respondent. Respondent's property called for

in the order was and is primarily drawings and plans. Therefore, its rights were but one strike of a match away from being lost forever. Under such circumstances, immediate relief was proper. In **Carroll v. Commissioners of Princess Anne**, *supra*, Justice Fortas for the Court wrote:

> "There is a place in our jurisprudence where exparte issuance without notice, of temporary restraining orders of short duration; . . . 393 U.S. 180, 21 L. Ed. at 330-31.

This is precisely the type of case where the exception to notice applies (assuming there had been compliance with the trial court's order). The order was emergency in nature. Notice would have precluded the relief sought. The intrusion upon petitioner's right to use property which the proof may ultimately reflect is his, was not severely restricted. Finally, even as reasonable as the order is, it has not been complied with but instead has been thwarted and evaded. Under these circumstances, it is your respondent who is aggrieved, not petitioner, and review should be denied.

(E)

Petitioner has waived any rights he may have had with respect to the order upon which the petition is predicated. It is well established that constitutional rights may be waived by a failure to assert them in a timely fashion. **Michel v. Louisiana**, 350 U.S. 91, 100 L. Ed. 83, 76 S. Ct. 158 (1955). See also **Ackermann v. United States**, 340 U.S. 193, 95 L. Ed. 207, 71 S. Ct. 209 (1959). Where the law is established and trial counsel fails to assert any right he may have on behalf of his client, the right is waived and forever lost. See **Curtis Publishing Co. v. Butts**, 388 U.S. 130, 18 L. Ed. 2d 1094, 87 S. Ct. 1975 (1967). Here, petitioner asserted the rights referred to

herein for the first time on appeal to the Georgia Supreme Court. This was obviously untimely and amounts to a waiver. Therefore, there is nothing for this Court to review and certiorari should be denied.

III

CONCLUSION

For the foregoing reasons, respondent urges that the writ of certiorari not be granted.

Respectfully submitted

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